Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARK AVERY HILL STERN,
Petitioner,

VS.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals Second District of Texas, Fort Worth
and the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Texas Senate Bill Act of June 19, 1993, Tex. S.B. 1067 73rd Leg. R.S. (1993), 73rd Leg. R.S.. Ch. 900 Sec. 1.19 (a) 1993 Tex. Gen. Laws 3586, 3626 (Current version at *Tex. Penal Code Ann.* Sec. 25.03 (d) Vernon 1994) creating a New State Jail Felony law under Sec. 25.03 - Tex. Penal Code Ann. can expressly deny the Petitioner the benefit of the lower punishment provided by the creation of this law since the newly enacted law is in conflict with *Tex. Gov't Code Ann.* Sec. 311.031 (B) providing the Petitioner's punishment *shall* be applied according to the statute as amended, thus denying the Petitioner due process under the Fifth and Fourteenth Amendments of the United States Constitution.

Whether Texas Senate Bill Act of June 19, 1993 Tex S.B. 1067 73rd Leg. R.S. (1993), 73rd. Leg. R.S. Ch. 900 Sec. 1.19 (a) 1993, Tex. Sen. Laws 3586, 3626 current version at Tex. Penal Code Ann. Sec. 25.03(d): Vernon (1994) creating a new State Jail Felony is a violation *U.S.C.A. Const. Art. 1 Sect. 9 Cl. 3, 10, Cl. 1 (Ex Post Facto Law*), denying the Petitioner a lower punishment as enacted by the new State Jail Felony *Tx. Penal Code Ann.* Sec. 25.03fd) .

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PETITION FOR WRIT OF CERTIORARI

MARK AVERY HILL STERN, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Appeals Second District of Texas, Fort Worth entered on August 2 9, 1996. Judgment and opinion taken on Petition for Discretionary Review to the Court of Criminal Appeals of Texas at Austin. Petition and re-hearing on Petition was denied by the Court of Criminal Appeals of Texas at Austin, Texas April 9, 1997.

OPINION BELOW

The opinion of the Court of Appeals Second District of Texas, Fort Worth, *Mark Avery Hill Stern, Appellant, vs. State of Texas Appellee Cause* No. 2-95-133-CR (Opinion unpublished) appears in the Appendix "A".

JURISDICTION

The judgment of the Court of Appeal Second District of Texas was entered on August 29, 1996. Petition for Discretionary Review was timely filed with the Court of Criminal Appeals of Texas at Austin on September 30, 1996. Petition was refused on February 19, 1997. Motion for Rehearing on Petition for Discretionary Review with the Court of Criminal Appeals of Texas was timely filed. Motion for Rehearing and the Petition for Discretionary Review with the Court of Criminal Appeals of Texas was refused on April 9, 1997. Said refusal appears in the Appendix "B" attached hereto. The Court of Appeals, Second District of Texas, Fort Worth, granted a Stay for the Petitioner to file of Writ of Certiorari with the Supreme Court. Appendix "C". The Courts jurisdiction is invoked under 28 U.S.C. Rules of the Supreme Court Rule 10 (b).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution: Fourteenth Amendment: Section (1): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution Art. I Sec. i, Cl. 3, 10, Cl. 1 (Ex Post Facto Laws)

STATUTES INVOLVED

Texas Penal Code 25.03 Interference with child custody:

(a) a person commits an offense if he takes or returns a child younger than 18 years when he:

(1) knows that this taking or retention violates the expressed terms of a judgment or order of a court dispersing the child custody or

(2) has been awarded custody of the child by a court of competent jurisdiction, knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child custody has been filed, and takes the child out of the geographic area of the countries

comparing the judicial district of the court is a district court or the county of the court is a statutory county court, without permission of the court and with intent to deprive the court of authority over the child.

Penal Provision - an offense under this section is a Third Degree Felony: Two (2) yrs. to ten (10) yrs. in the Texas Department of Criminal Justice and an optional fine not to exceed $10,000.

Penal Provision substantive change 9-1-94 States Jail Felony - 180 days to two (2) yrs. in a state jail and optional fine not to exceed $10,000.

Community supervision by judge - two (2) to five (5) years: (1) mandatory if no prior conviction *Tex. Code. Crim. Proc. Ann.* Art. 42.12 Sec. 5 (b) Deferred Adjudication; community Supervision.

Tex. Gov't Code Ann. Sec. 311.031(B): It is provided that if the penalty forfeiture, or punishment for any offense is reduced by a re-enactment, revision, or amendment of Statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

STATEMENT OF THE CASE

Petitioner was accused by indictment with the felony offense of Interference with Child Custody which occurred on June 23, 1989 in violation of the provision of *Tex. Penal Code Ann.* Sec. 25.03. Petitioner and State each waived their respective right to a trial by jury and Petitioner entered a plea on November 2, 1990. The District Court found the evidence sufficient to substantiate guilty, however no finding of guilty was entered by the Court and the Petitioner was placed on probation for a period of eight (8) years. *Tex. Code* Crim. Ann. Art. 42.12 Sec. 3d(B). At the time of the Petitioner's plea to the offense of Interference with Child Custody *Tex. Penal. Code. Ann.* Sec. 25.03, the punishment was

a Third Degree Felony with a penalty range of not less than two (2) years nor more then ten (10) years confinement and fine may be imposed. Effective September 1, 1994, the Texas legislature amended the penalty range, denominated the offense a State Jail Felony and provided a mandatory punishment of probation for first offenders. The punishment range: 180 days - 2 years in state jail facility.

The State filed its first Motion to Revoke and proceed to adjudication of July 22, 1991. The motion was withdrawn and Appellant remained on probation. The State later filed a Motion to Adjudicate on December 6, 1994 and amended motion February 23, 1995. On April 6, 1995, the trial court found that Appellant failed to report to the probation officer, failed to pay probation fees and restitution, and failed to attend alcoholics anonymous/narcotics anonymous counseling as ordered. The court adjudicated guilty and assessed punishment under *Tex. Penal Code Ann.* Sec. 25.03 at six (6) years in the Texas Department Criminal Justice. Notice of Appeal was timely given.

The Court of Appeals affirmed Appellant;s conviction on August 29, 1996. A copy of the opinion is attached as Appendix "A". The Petition for Discretionary Review was timely filed with the Court of Criminal Appeals of Texas in Austin, Texas September 30, 1996. The Petition for Discretionary Review was denied February 19, 1997. Petitioner filed Motion of Rehearing and said motion was denied on April 9, 1997. Petitioner filed Motion for Stay Mandate with the Court of Appeals Second District of Texas, Fort Worth. A Stay was granted until timely filing and a ruling of the Appellant's Petition for Writ of Certiorari to the United States Supreme Court order granted May 15, 1997. Appendix "C".

ARGUMENT

The Petitioner was indicted for the offense of Interference Child Custody which occurred June 23, 1989. On November 2, 1990, pursuant to a plea bargain agreement, the trial court deferred adjudication of guilt and placed Petitioner on probation for a term of eight (8) years. There was no finding of *Guilt*, no *Punishment* assessed and no *Conviction*. The case remained open on deferred adjudication status. On September 1, 1994, the State of Texas enacted a new state Jail Felony including Texas Penal Code 25.03 which reduced the punishment range from two (2) to ten (10) years in the Texas Department of Criminal Justice. New punishment range was 180 days to two years in a state jail facility. The change is procedural.

The act creating the new state tail ;felony law provides:

> (A) The change in law by this article applies only to an offense committed on or after the effective date of this article. For the purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before this effective date.
>
> (B) An offense committed before the effective date of the article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. Tex. S.B. 1067 73rd Leg. R.S. (1993).

The issues presented herein were not resolved by the Court of Appeals, Second District of Texas, Fort Worth, nor has the Court of Criminal Appeals of Texas resolved the conflict between the provision of the Code Construction Act and the savings provision of the State Jail Felony Act.

The change in the law is procedural then the Petitioner can benefit from the change. *U.S.C.A. Const. Art. 1 Sec. 9, Cl. 3 10 Cl. 1 (Ex Post Facto Laws)* violation has occurred. State Jail Felony is enacted which allows for a sentence range lower than

received by this Petitioner. This cases falls within Ex Post Facto: first, the law in the Petitioner's case was retrospective and appealed to events occurring before its enactment and second. the punishment disadvantaged the Petitioner. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960. 67 L. Ed. 2d 17 (1981). *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798). The United States Supreme Court has held "because rules of procedure regulate secondary rather than primary conduct, the fact a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive". *Landgraf v. U.S.I. Film Products*, 114 S. Ct. 1483 (1994) (citing) *CJ. McBurnew v. Carson*, 99 U.S. 567 (1879). The Supreme Court has held that the government showed accord grace to private parties disadvantaged by an old rule when it adopts a new one. Ibid. In *Thorp v. Housing Authority of Durham*, 383 U.S. 268 (1969), the Court ordered that all prosecutions pending when the National Prohibition Acts was repealed be dismissed. (*United States v. Chambers*, 291 U.S. 217 (1934). If a criminal defendant were charged with a capital offense and the procedural laws allowing execution were repealed during the pendency of the case, the defendant would receive the benefit of the procedural change and not be executed. Id.

The Texas Legislature enacted Section 12.35 of the Texas Penal Code which introduced the State Jail Felonies Act. The act became effective on September 1, 1994. Acts approved June 1993, 73rd Leg. R. S. Ch. 900 Sec. 1.19 (a) 1993 Tex. Gen. Laws 3586, 3626.

This Petitioner argues that punishment provided by the State Jail Felony statue should be applied herein because at the time the court adjudicated the previously differed proceeding and found this Petitioner guilty, the Texas legislative procedural change creating a new punishment category of State Jail Felonies was created.

This denial was in violation of the Petitioners Fifth and Fourteenth Constitutional right to due process and Ex Post Facto Laws of the *U.S.C.A. Const. Art. 1, Sec. 9, Cl. 3, 10, Cl. 1*

CONCLUSION

Petitioner respectfully requests that this petition for a Writ of Certiorari be granted and that the Court of Appeals Second District of Texas judgment be reversed, or in the alternative, vacated and remanded for lower punishment, as provided by the United States Const. Art. 1, Sec. 9, Cl. 3, (Ex Post Facto Laws) and as provided in the new State Jail Felony punishment. *Tex. Penal Code Ann.* Sec. 25.03, or in the alternative holding Tex. S.B. 1067, 73rd Leg., R.S. (1993) in conflict and unconstitutional by restriction the Petitioner due process to benefit a procedural change in the laws provided for in the saving provision of the *Tex. Gov't. Code Ann.* Sec. 311.031(b) providing that if the penalty or punishment of any offense is reduced by an re-enactment, revision, or amendment of a statute, the penalty or punishment, if not already improved *shall* be applied according to the statue as amended.

Respectfully submitted,

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